

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOHN ANDRE BAZILE,

Petitioner,

vs.

DWIGHT NEVEN, et al.,

Respondents.

Case No. 2:05-CV-00863-KJD-(GWF)

AMENDED ORDER

Before the Court are Respondents' Motion to Dismiss (#12) and Petitioner's Response (#13). The Court grants the Motion (#12) because Petitioner has not exhausted his state-court remedies for Ground One of the Petition for a Writ of Habeas Corpus (#6).

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court, describing the operative facts and legal theory, and give that court the opportunity to address and resolve the ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v. Harless, 459 U.S. 4, 6 (1982).

"[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterized the claims he raised in state proceedings specifically as federal claims. In short, the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law." Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law

1 which applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d
2 1153, 1158 (9th Cir. 2003) (en banc). “The mere similarity between a claim of state and federal
3 error is insufficient to establish exhaustion. Moreover, general appeals to broad constitutional
4 principles, such as due process, equal protection, and the right to a fair trial, are insufficient to
5 establish exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

6 After a jury trial, Petitioner was convicted of first degree murder with the use of a
7 deadly weapon. Ex. E (#12-2, p. 21).¹ Petitioner appealed, and the Nevada Supreme Court
8 affirmed. Ex. I (#12-4, p. 16). Petitioner then filed a state habeas corpus petition. Ex. K (#12-5
9 through #12-9). The state district court denied the petition. Ex. P (#12-11, p. 22). Petitioner
10 appealed, and the Nevada Supreme Court affirmed. Ex. T (#12, 12, p. 26).

11 Ground One is a claim of ineffective assistance of counsel, divided into six (6) sub-
12 claims. Respondents note that Petitioner presented the same claim to the district court in his state
13 habeas corpus petition. Motion to Dismiss, p. 6 (#12-1). The district court dismissed almost all of
14 the grounds. It conducted an evidentiary hearing on the remaining claim that trial counsel had failed
15 to investigate and present evidence that the witness to the murder, Kimberly Fondi,² was actually the
16 killer. Ex. P, p. 2 (#12-11, p. 24). When the trial court denied that claim, it noted, “One who would
17 claim ineffective assistance of counsel must bear the burden of showing by strong and convincing
18 evidence that some specific decision of counsel fell below an objective standard of reasonableness
19 and that but for the failings of counsel a different result was likely.” Id., p. 3 (#12-11, p. 25) (citing
20 Strickland v. Washington, 466 U.S. 668 (1984) (emphasis added). On appeal to the Nevada
21 Supreme Court, Petitioner did not present the substance of any of his claims. Instead, he argued that
22 the district court committed two legal errors: (1) The correct burden of proof was preponderance of
23 the evidence, not strong and convincing evidence; and (2) dismissal pursuant to Rule 41(b) of the
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26 ¹All exhibits are attached to the Motion to Dismiss (#12). Page numbers in parentheses refer
27 to the Court’s electronic image file.

28 ²Her surname is also spelled “Fondy” in court records.

1 Nevada Rules of Civil Procedure was incorrect.³ Ex. R, pp. 3-5 (#12-12, pp. 8-10). The Nevada
 2 Supreme Court noted that after Petitioner's conviction had become final, it had determined that a
 3 preponderance of the evidence was the correct burden of proof for disputed factual allegations
 4 underlying a claim of ineffective assistance of counsel. Ex T, p. 2 (#12-12, p. 27) (citing Means v.
 5 State, 103 P.2d 25 (Nev. 2004)). The court then held:

6 However, even assuming Means applies to Bazile's case, we conclude that Bazile
 7 failed to demonstrate that applying this lesser burden of proof would have entitled
 8 him to relief. In rejecting Bazile's claims that his counsel was ineffective for failing
 9 to investigate and present evidence exonerating him and for advising him not to
 10 testify at trial, the district court found: that Bazile failed to present any evidence
 11 additional investigation would have uncovered; that Bazile had confessed to the
 12 police, the news media, and at least two other people; and that Bazile failed to
 identify any flaw in his counsel's advice that he not testify at trial. The district
 court's findings of fact regarding claims of ineffective assistance of counsel are
 entitled to deference upon appellate review. Bazile produced no evidence on appeal
 casting doubt on the district court's findings. Accordingly, we conclude that no relief
 is warranted in this regard.

13 Ex. T, pp. 2-3 (#12-12, pp. 27-28).

14 The Court agrees with Respondents. Petitioner's issues on his habeas corpus appeal
 15 were questions about the burden of proof and the method of dismissal of his petition. Petitioner did
 16 not alert the Nevada Supreme Court that he was presenting the actual federal issue of ineffective
 17 assistance of counsel. The Nevada Supreme Court's decision only compares the burden of proof
 18 that the district court used with the correct burden of proof. Nowhere in its decision does it hint that
 19 it was considering on its own initiative the federal issue of ineffective assistance of counsel.
 20 Consequently, Petitioner has not exhausted his available remedies in state court for Ground One.

21 The Petition (#6) is mixed, containing both claims exhausted in state court and
 22 claims not exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S. 509,
 23 521-22 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may voluntarily
 24 dismiss the unexhausted Ground 1 and proceed with the remaining grounds, he may voluntarily
 25 dismiss this action without prejudice while he returns to state court to exhaust Ground 1, or he may

27 ³At the time, Rule 41(b) allowed the defendant to move to dismiss on the basis that the
 28 plaintiff had failed to prove a sufficient case.

1 move to stay this action while he returns to state court to exhaust Ground 1. If Petitioner chooses
 2 the last option, he must show that he has “good cause for his failure to exhaust, his unexhausted
 3 claims are potentially meritorious, and there is no indication that the petitioner engaged in
 4 intentionally dilatory litigation tactics.” Rhines v. Weber, 544 U.S. 269, ___, 125 S. Ct. 1528, 1535
 5 (2005).

6 Petitioner has also submitted a Motion for Appointment of Counsel (#14).
 7 Whenever the Court determines that the interests of justice so require, counsel may be appointed to
 8 any financially eligible person who is seeking habeas corpus relief. 18 U.S.C. § 3006A(a)(2)(B).
 9 “[T]he district court must evaluate the likelihood of success on the merits as well as the ability of
 10 the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved.”
 11 Weygandt v. Look, 718 F.2d 952 (9th Cir. 1983). There is no constitutional right to counsel in
 12 federal habeas proceedings. McCleskey v. Zant, 499 U.S. 467, 495 (1991). The factors to consider
 13 are not separate from the underlying claims, but are intrinsically enmeshed with them. Weygandt,
 14 718 F.2d at 954. After reviewing the Petition (#6), the Court concludes that appointment of counsel
 15 is not warranted.

16 IT IS THEREFORE ORDERED that Respondents’ Motion to Dismiss (#12) is
 17 **GRANTED.**

18 IT IS FURTHER ORDERED that Petitioner shall have thirty (30) days from the date
 19 of entry of this Order to do one of the following: (1) inform this Court in a sworn declaration that
 20 he wishes to dismiss Ground 1 of his Petition (#6), and proceed only on the remaining grounds for
 21 relief, (2) inform this Court in a sworn declaration that he wishes to dismiss his Petition (#6) to
 22 return to state court to exhaust his state remedies with respect to the claims set out in Ground 1 of
 23 his Petition (#6), or (3) move to stay this action while he returns to state court to exhaust his state
 24 remedies with respect to the claims set out in Ground 1 of his Petition (#6). Failure to comply will
 25 result in the dismissal of this action.

26 IT IS FURTHER ORDERED that if Petitioner elects to dismiss the aforementioned
 27 grounds of his Petition (#6) and proceed on the remaining grounds, Respondents shall file and serve
 28 an answer or other response to the remaining grounds within thirty (30) days after Petitioner serves

1 his declaration dismissing those grounds. If Respondents file and serve an answer, it shall comply
2 with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts.

3 IT IS FURTHER ORDERED that if Respondents file and serve an answer, Petitioner
4 shall have thirty (30) days from the date on which the answer is served to file and serve a reply.

5 IT IS FURTHER ORDERED that Petitioner's Motion for Appointment of Counsel
6 (#14) is **DENIED**.

7 DATED this 26 day of June, 2006.

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KENT J. DAWSON
United States District Judge